

ANN BAVENDER\*  
KAREN L. CASSER\*  
ANNE GOODWIN CRUMP\*  
VINCENT J. CURTIS, JR.  
RICHARD J. ESTEVEZ  
PAUL J. FELDMAN\*  
ERIC FISHMAN\*  
RICHARD HILDRETH  
EDWARD W. HUMMERS, JR.  
FRANK R. JAZZO  
ANDREW S. KERSTING\*  
KATHRYN A. KLEIMAN  
EUGENE M. LAWSON, JR.  
HARRY C. MARTIN\*  
GEORGE PETRUTSAS  
LEONARD R. RAISH  
JAMES P. RILEY  
MARVIN ROSENBERG  
KATHLEEN VICTORY\*  
HOWARD M. WEISS

\* NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW

11th FLOOR, 1300 NORTH 17th STREET

ROSSLYN, VIRGINIA 22209-3801

(703) 812-0400

TELECOPIER

(703) 812-0486

INTERNET

HILDRETH@ATTMAIL.COM

FRANK U. FLETCHER  
(1939-1985)  
ROBERT L. HEALD  
(1956-1983)  
PAUL D.P. SPEARMAN  
(1936-1982)  
FRANK ROBERSON  
(1936-1961)  
RUSSELL ROWELL  
(1948-1977)

RETIRED  
EDWARD F. KENEHAN

CONSULTANT FOR INTERNATIONAL AND  
INTERGOVERNMENTAL AFFAIRS  
SHELDON J. KRYS  
U. S. AMBASSADOR (ret.)

OF COUNSEL  
EDWARD A. CAINE\*

WRITER'S NUMBER  
(703) 812-

RECEIVED

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

November 30, 1995

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VIA HAND DELIVERY

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20054

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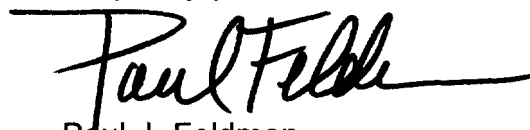
Re: IB Docket No. 95-168/PP Docket No. 93-253  
Revision of Rules and Policies for the  
Direct Broadcast Satellite Service

Dear Mr. Caton:

Transmitted herewith, on behalf of United States Satellite Broadcasting Company, Inc., are an original and four copies of its Reply Comments in the above-referenced proceeding.

Should there be any questions, please communicate with the undersigned.

Very truly yours,



Paul J. Feldman  
Counsel for United States  
Satellite Broadcasting Company, Inc.

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Enclosures

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
)  
Revision of Rules and Policies )  
for the Direct Broadcast )  
Satellite Service )

IB Docket No. 95-168  
PP Docket No. 93-253

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REPLY COMMENTS OF UNITED STATES  
SATELLITE BROADCASTING COMPANY, INC.

Marvin Rosenberg  
Paul J. Feldman  
FLETCHER, HEALD & HILDRETH, P.L.C.  
1300 North 17th Street, 11th Floor  
Rosslyn, VA 22209  
Its Attorneys  
703/812-0400

November 30, 1995

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## TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	ii
I. THE RECORD SUPPORTS FLEXIBLE USE OF DBS CAPACITY	1
II. THE EXTENSION OF TEMPO II CONDITIONS IS JUSTIFIED	4
III. LIMITATIONS ON FULL-CONUS CHANNEL CAPACITY HELD BY ONE DBS OPERATOR ARE APPROPRIATE	7
IV. THERE IS NO CURRENT NEED FOR ADDITIONAL PROGRAM ACCESS RULES	8
V. THERE IS NO LEGAL OR POLICY BASIS FOR IMPOSING "SPECTRUM FEES" ON EXISTING DBS OPERATORS	10
VI. CONCLUSION	11

## SUMMARY

In its initial Comments in this proceeding, United States Satellite Broadcasting Company, Inc. ("USSB") suggested that revision to certain DBS service rules should enhance the diversity and growth of DBS service, and should strengthen DBS operators, thus making them stronger competitors in the multichannel video market. There is substantial support in the record for enactment of these revisions.

The record supports the Commission's proposal to provide additional flexibility to DBS operations by applying the limitation on non-video DBS service to overall capacity, rather than to individual transponders. The Commission long ago concluded that the transmission of non-video data does not constitute a *de facto* reallocation of DBS spectrum, and more flexible use of capacity is necessary for DBS to be a viable competitor in the multichannel video market.

The history of anti-competitive abuses by cable TV operators, and the nascent stage of the DBS industry, justifies the extension of the *Tempo II* conditions, as proposed in the Notice. And while the *Tempo II* conditions should limit some possible anti-competitive actions, the additional restrictions proposed by USSB are also necessary to ensure the ability of DBS to provide substantial competition to the cable TV industry.

GE American Communications suggests that the proposed 32 full-CONUS channel limitations should be placed only on DBS programmers, but not on operators that merely provide satellite capacity to such programmers. However, even if a DBS operator does not directly market programming to the public, but rather only provides capacity for such

programmers, that operator has substantial control over the DBS market due to its ability to select the programmers that it carries. Such an operator's control over the DBS market would be even further expanded if it were allowed to have 32 full-CONUS channels that it programmed itself, in addition to an unlimited number of channels that it used to provide capacity to other programmers.

While the Notice properly recognized that there is no need to expand the program access rules, the National Rural Telecommunications Cooperative reiterated its standard argument that such rules should be expanded to prohibit exclusive agreements between vertically-integrated programmers and non-cable affiliated DBS operators. NRTC added nothing new to the arguments that have already been extensively considered and rejected by the Commission in a separate proceeding. And BellSouth's argument that such agreements put other DBS operators at risk is unpersuasive: there is no showing that exclusive programming agreements held by non-affiliated DBS operators create any risks to new entrants. Further, such permitted exclusive agreements result in a competitive environment within DBS, as well as make existing DBS operators much stronger competitors against cable TV operators.

Lastly, there is absolutely no valid legal or policy basis for imposing "spectrum fees" on any DBS operator that has not paid for spectrum in an auction, as suggested by Continental Cablevision.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of Rules and Policies)		IB Docket No. 95-168
for the Direct Broadcast	)	PP Docket No. 93-253
Satellite Service	)	

**REPLY COMMENTS OF UNITED STATES  
SATELLITE BROADCASTING COMPANY, INC.**

United States Satellite Broadcasting Company, Inc. ("USSB"), by its attorneys, hereby submits its Reply Comments in response to various Comments submitted in the above-captioned proceeding.<sup>1</sup> In its Comments in this proceeding, USSB supported revisions to certain interim DBS service rules, which, in its considered opinion, would enhance the opportunities for the diversity and growth of the DBS service, and make DBS operators more effective competitors in the multichannel video market. Other comments in the record lend support to the enactment of these revisions.

**I. THE RECORD SUPPORTS FLEXIBLE USE OF DBS CAPACITY.**

In its Comments, USSB supported the Commission's proposal for additional flexibility in the DBS service by applying the limitation on the provision of non-video DBS services to the DBS operator's overall capacity, rather than applying it to individual transponders. Such flexibility will serve the public interest by promoting technological advancement, by allowing the public to receive a variety of advanced data and information services, and

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<sup>1</sup> See, *Notice of Proposed Rulemaking*, FCC 95-443, released October 30, 1995 ("Notice").

importantly, by allowing DBS to be a stronger competitor in the multichannel video market.

The majority of commenters that addressed this issue supported the Commission's proposal.<sup>2</sup> Only three parties opposed the Commission's proposal. Primestar Partners L.P. ("Primestar") suggests (at pages 15-17) that greater flexibility in the use of DBS spectrum would constitute a *de facto* reallocation, is unnecessary given the growth of the DBS service, and threatens the future viability of the DBS service. See also Comments of Tempo DBS, Inc. ("Tempo") at page 33 and Comments of GE American Communications, Inc. ("GE Americom") at page 21. These assertions provide no basis for Commission forbearance.

Primestar chooses to ignore the fact that the Commission long ago concluded that the DBS service includes the transmission of non-video data, and accordingly, the use of DBS spectrum for such services does not constitute a *de facto* reallocation.<sup>3</sup> Nothing in the Commission's current proposal, or in the foreseeable nature of non-video DBS services, provides a basis for revising the

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<sup>2</sup> See, Comments of the National Rural Telecommunications Cooperative ("NRTC") at page 10; Comments of MCI Telecommunications Corp. ("MCI") at page 8; Comments of DIRECTV, Inc. at page 24; Comments of Direct Broadcast Satellite Corp. ("DBSC") at page 15, Comments of the Department of Justice ("DOJ") at page 18; Comments of the State of Hawaii at pages 5-6.

<sup>3</sup> See, *United States Satellite Broadcasting Company, Inc.*, 1 FCC Rcd 977,978-79(1986) ("USSB"), citing, *DBS Report and Order*, 90 FCC 2d 676,682 (1982). It also should be noted that Section 100.3 of the Commission's rules defines DBS as a service "in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public." There is no stated requirement regarding the video or non-video nature of such signals.

Commission's earlier conclusion. Indeed, given the advancements in digital compression technology, DBS operators will be able to provide more than the number of video channels originally foreseen by the Commission when it authorized DBS, and yet there will be sufficient spectrum also available to provide non-video data transmission and other services.

The assertions of Primestar, Tempo and GE Americom, that provision of non-video DBS services is unnecessary and would have a negative impact on the viability of DBS, are equally invalid. The Commission has previously recognized that "flexibility of use remains an important touchstone for fostering the provision of DBS services."<sup>4</sup> While DBS has grown rapidly since its introduction in 1994, it is still a nascent service in comparison to the cable TV industry. Flexible use of the spectrum is necessary for the development of new and innovative DBS services, and to enable DBS to continue to grow as a substantial competitor in the multichannel video market. Indeed, far from undermining the viability of DBS, the provision of non-video data transmission services may be necessary for DBS to function as a viable competitor in a multichannel video market dominated by cable TV and video dialtone operators committed to integrating telephone and internet access

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<sup>4</sup> USSB, 1 FCC Rcd at 979.

services into their multichannel video offerings.<sup>5</sup> It can only be with a great sense of irony that competitors to DBS suggest that DBS transmission of non-video data is unnecessary or threatens the viability of DBS. In any case, such assertions are not credible.

## II. THE EXTENSION OF *TEMPO II* CONDITIONS IS JUSTIFIED.

In its Comments, USSB stated that it shares the Commission's concern that a DBS operator owned or controlled by a cable TV operator could not be expected to vigorously compete with its own cable systems. Notice at para. 35. Accordingly, USSB supports the Commission's proposal to extend the "*Tempo II*" requirements to all operators affiliated with non-DBS MVPDs. Such conditions fairly promote competition in the multichannel video market, while allowing non-DBS MVPDs the opportunity to participate in DBS.

In addition to the two conditions imposed by the Commission in *Tempo II*, USSB suggested that the following additional conditions be added where a DBS provider is affiliated with a non-DBS-MVPD:

1. Prohibit the tying or combining of the DBS service with the affiliated MVPD service that would result in a discount or reduction of the fee that would be charged to a subscriber who purchased each service independently;
2. Prohibit the tying or combining in any way of programming from the DBS service with programming carried on the affiliated MVPD service into a single offering to the public; and
3. Preclude tying or combining the purchase or licensing of programming for the DBS service with the purchase or licensing of programming for the affiliated MVPD service.

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<sup>5</sup> See, e.g., Comments of Continental Cablevision, Inc. ("Continental Cablevision") at pages 19-20. See also Comments of USSB at note 3, and "3 Cable Giants in Modem Deal with Motorola," New York Times, November 30, 1995, at page D4 (TCI, Comcast and Time Warner purchasing modems, signaling their move into the on-line and internet access market).

It comes as no surprise that commenters affiliated with non-DBS MVPDs opposed the Commission's proposal. For example, Time Warner Entertainment Co., Inc. ("Time Warner") suggests that extension of the *Tempo II* conditions is unnecessary, since there is no evidence that DBS operators affiliated with non-DBS MVPDs will participate in any anti-competitive behavior. Time Warner Comments at page 16. However, the Commission cannot ignore history. It was the substantial record of anti-competitive abuses by the Nation's major cable operators that led to the inclusion of provisions designed to achieve effective competition in the 1992 Cable Act, and separately resulted in the filing of anti-trust cases by the United States Department of Justice and the attorneys general of over 40 states.<sup>6</sup> In the three years since the *Tempo II* case, nothing has changed the underlying economic incentive that would dissuade a DBS operator affiliated with other multichannel video services (e.g., cable TV) from vigorously competing with its non-DBS affiliates. Cable TV operators suggest that the presence of non-affiliated DBS operators will prevent cable-affiliated DBS operators from charging artificially high DBS rates to protect their cable operations. But such parties want to overlook the obvious danger that cable operators could cross-subsidize their DBS operations and enable the charging of artificially low rates for DBS services, resulting in the loss of market share by unaffiliated DBS operators. The net result would be the consolidation of cable

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<sup>6</sup> See, e.g., *United States v. Primestar Partners*, 1994-1 Trade Cas. (CCH) ¶70,562 (S.D.N.Y. 1994).

control over the broader MVPD market.<sup>7</sup>

Time Warner suggests (Comments at page 16) that the success that DBS operators have had so far in obtaining programming negates the need for the extension of *Tempo II* conditions. But continuing vigilance and protections are necessary not just *vis a vis* existing programming services, but in regard to new programming services. The combined purchasing power of a cable operator with its DBS operation could effectively force new independent programmers to deal only with the cable affiliated DBS provider, thus impairing the freedom of a normal marketplace.

Lastly, Continental Cablevision (Comments at page 20) and Time Warner (Comments at page 16) both suggest that extension of the *Tempo II* conditions would limit cable-affiliated DBS operators from packaging and cross-promoting services in a manner that would harm the ability of such DBS operators to remain competitive in the overall communications market. These unsupported assertions miss a critical point: the *Tempo II* conditions do not restrict all packaging or cross-promotional activities; rather, they only restrict those that constitute anti-competitive behavior. More importantly, to the extent the *Tempo II* conditions slightly restrict the abilities of cable-affiliated DBS operators to compete within the DBS market, the conditions do serve the greater public interest goal of having a vibrant DBS industry to provide competition to the monopolist cable TV industry that dominates the MVPD market. This, of course, was the major reason why the

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<sup>7</sup> See Comments of DIRECTV at page 18.

Commission authorized DBS service.

In sum, the history of anti-competitive abuses by cable TV operators, and the nascent stage of the DBS industry, justifies the extension of the *Tempo II* conditions, as proposed in the Notice. And while the *Tempo II* conditions serve to limit some possible anti-competitive actions, the restrictions proposed by USSB are also necessary to ensure the ability of DBS to provide substantial competition to the cable TV industry.<sup>8</sup>

**III.        LIMITATIONS ON FULL-CONUS CHANNEL CAPACITY  
             HELD BY ONE DBS OPERATOR ARE APPROPRIATE.**

In their Comments, USSB and many other commenters<sup>9</sup> shared the Commission's concern that excessive channel accumulation by one or more DBS operators would result in limiting the spectrum available to future DBS competitors, and accordingly, a limit on full-CONUS channel capacity held by an individual DBS operator is appropriate. USSB suggested the following formula to preserve spectrum for intra-DBS competition, while ensuring that individual DBS operators have sufficient spectrum to offer robust competition to other MVPDs: any operator (including its affiliates or subsidiaries) that has an authorization for, or otherwise controls through leases or similar agreements, 16 or more channels at any particular eastern orbital slot, should be prohibited from holding authorizations for or operating from any other eastern orbital slot. The end result

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<sup>8</sup> DIRECTV has also submitted a number of proposed restrictions in Appendix 2 of its Comments.

<sup>9</sup> See, e.g., Comments of MCI at page 13; Comments of Panamsat at pages 2-4; Comments of Viacom at page 5; Comments of DOJ at page 19.

would be that at least four or more, full-CONUS DBS services would have sufficient program channels to provide a dynamic and competitive service.

GE Americom suggests (at pages 11-16) that such limitations should be placed only on DBS programmers, and should not be extended to operators that merely provide satellite capacity to DBS programmers. GE Americom asserts that without its proposed modification, the DBS spectrum cap would inappropriately be applied to parties that are not subject to the competitive concerns underlying the cap. Comments at page 12.

USSB disagrees with GE Americom's analysis. Even if a DBS operator does not directly market programming to the public, but rather only provides capacity for such programmers, that operator has substantial control over the DBS market due to its ability to select the programmers to be carried. This ability to select its programmer customers and establish the terms and conditions of carriage are especially influential given the limited number of full-CONUS orbital positions. Such an operator's control over the DBS market would be even further expanded if it were allowed to itself program 32 full-CONUS channels, and, in addition, be the licensee of an unlimited number of channels that it could use to provide capacity to other programmers. GE Americom's suggestion must be rejected.

**IV. THERE IS NO CURRENT NEED FOR  
ADDITIONAL PROGRAM ACCESS RULES.**

In its initial Comments, USSB noted that a current need for an additional program access rule addressing anti-competitive program

agreements involving DBS operators unaffiliated with cable TV operators has not been shown. There was widespread agreement among the Commenters on this position.<sup>10</sup> It is clear that if a DBS operator affiliated with a cable operator were to engage in anti-competitive programming practices, that Section 628 and the program access rules would be triggered, and such provisions should serve to remedy any improper conduct.

While the *Notice* properly recognizes that the Commission has held that the program access rules do not apply to exclusive programming contracts licensing a DBS operator that does not own the programming involved, and that itself is not affiliated with a cable TV operator, two commenters have advanced suggestions that conflict with the Commission's well reasoned decision. The National Rural Telecommunications Cooperative ("NRTC") reiterated (at pages 7-8) its well worn and previously rejected argument that the program access rules should be expanded to prohibit exclusive arrangements between vertically-integrated programmers and non-cable affiliated DBS operators. NRTC adds nothing new to its past arguments which have already been extensively considered and rejected by the Commission in a separate proceeding.<sup>11</sup>

BellSouth Corporation ("BellSouth") asserts that in view of the financial risks associated with operating a DBS service, the Commission should ensure that all new entrants to the DBS industry

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<sup>10</sup> See, e.g., Comments of Continental Cablevision at pages 16-19; Comments of Primestar at pages 28-31; Comments of MCI at pages 19-22.

<sup>11</sup> See, *Video Programming Distribution and Carriage*, Memorandum Opinion and Order, 10 FCC Rcd 3105, 3123 (1994).

have uninhibited access to programming offered by any other MVPD. Comments at page 9. BellSouth's argument is unpersuasive: there is no showing that exclusive programming agreements held by non-affiliated DBS operators create any risks to new entrants. Further, such permitted exclusive agreements result in a competitive environment within DBS, as well as make DBS operators much stronger competitors against cable TV operators.

**V. THERE IS NO LEGAL OR POLICY BASIS FOR IMPOSING "SPECTRUM FEES" ON EXISTING DBS OPERATORS.**

Continental Cablevision suggests that the Commission should impose "spectrum fees" on any DBS operator that has not paid for spectrum in an auction. Comments at pages 21-22. This ill-conceived idea is hardly worthy of consideration.

First, there is no legal basis for the imposition of such "fees." Section 309 of the Communications Act empowers the Commission to auction mutually exclusive radio licenses, but makes no provision for collecting "spectrum fees" from holders of existing licenses and permits. No other provision of the Communications Act authorizes the collection of such fees.

Furthermore, there is no valid policy basis for imposition of such fees. Continental Cablevision complains that a successful bidder for auctioned DBS frequencies will have paid a substantial up-front cost that will leave it competitively disadvantaged *vis a vis* DBS operators who have not paid such costs. If this is so, then the bidders for the DBS spectrum will take this into account in determining the amount to be bid.

Not surprisingly, there is no precedent for Continental's

suggested spectrum fee. For example, while the Commission is auctioning personal communications services licenses, it has not imposed a "spectrum fee" on cellular telephone operators. Indeed, Continental's asserted "competitive disadvantage" ignores the substantial equity and years of effort invested by existing DBS operators, in making DBS a viable service, in which Continental now seeks to participate.

Continental's proposal suggests a childish reaction of "I got hit, so I want to hit you." In any case, its spectrum fee suggestion is unworthy of further consideration.

#### VI. CONCLUSION

Modification to the Commission's DBS service rules, as discussed above and in USSB's initial Comments, should enhance the diversity and growth of the DBS service, and should strengthen DBS operators, making them stronger competitors in the multichannel video market.

Respectfully submitted,



Marvin Rosenberg  
Paul J. Feldman

Counsel for United States  
Satellite Broadcasting Company, Inc.

FLETCHER, HEALD, & HILDRETH, P.L.C.  
1300 North 17th Street  
11th Floor  
Rosslyn, VA 22209  
(703) 812-0400

November 30, 1995

pf#b/srv-rul.rep

CERTIFICATE OF SERVICE

I, Inder Kashyap, an employee of Fletcher, Heald & Hildreth, P.L.C., hereby certify that copies of the foregoing "REPLY COMMENTS" were filed with the Federal Communications Commission on November 30, 1995, and copies served on that same day by first class U.S. mail, postage prepaid, to the following:

Joseph A. Godles  
W. Kenneth Ferree  
Goldberg, Godles, Wiener & Wright  
1229 Nineteenth Street, NW  
Washington, DC 20036  
(Counsel for PANAMSAT CORP.)

Michael Fricklas  
Sr. Vice President,  
Deputy General Counsel  
VIACOM INC.  
1515 Broadway  
New York, NY 10036

Donald J. Russell, Chief  
Telecommunications Task Force  
Antitrust Division  
U.S. Department of Justice  
555 4th Street, N.W., Rm. 8104  
Washington, DC 20001

Philip V. Otero  
Alexander P. Humphrey  
GE American Communications, Inc.  
Four Research Way  
Princeton, N.J. 08540

Larry A. Blosser  
Carol R. Schultz  
MCI Telecommunications Corp.  
1801 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

Norman P. Leventhal  
Leventhal, Senter & Lerman  
2000 K Street, NW, Ste. 600  
Washington, DC 20006  
(Of Counsel: MCI Telecommuni-  
cations Corp.)

William L. Fishman  
Sullivan & Worcester  
1025 Connecticut Ave., NW  
Suite 1000  
Washington, DC 20036  
(Counsel for Direct  
Broadcast Satellite Corp.)

Herbert E. Marks  
Marc Berejka  
Brian J. McHugh  
Squire, Sanders & Dempsey  
1201 Pennsylvania Ave., NW  
Washington, DC 20044  
(Counsel for State of Hawaii)

Benjamin J. Griffin  
James J. Freeman  
Kathleen A. Kirby  
Reed, Smith, Shaw & McClay  
1301 K Street, NW  
Suite 1100, East Tower  
Washington, DC 20005  
(Counsel for  
Primestar Partners L.P.)

David P. Beddow, President  
TEMPO DBS INC.  
4100 E. Dry Creek Road  
Littleton, CO 80122

Brian Conboy  
Todd G. Hartman  
Willkie, Farr & Gallagher  
Three Lafayette Center  
1155 21st Street, NW  
Washington, DC 20036-3384  
(Counsel for Time Warner  
Entertainment Co., L.P.)

Jack Richards  
John Reardon  
Keller and Heckman  
1001 G Street, N.W.  
Suite 500 West  
Washington, DC 20001  
(Counsel for NRTC)

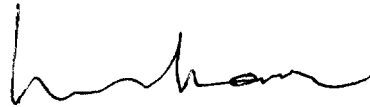
John F. Beasley  
William B. Barfield  
Jim O. Llewellyn  
1155 Peachtree Street, N.E.  
Suite 1800  
Atlanta, Georgia 30309-2641  
(Counsel for Bellsouth  
Corporation)

Charles P. Featherstun  
David G. Richards  
1133 21st Street, NW  
Washington, DC 20036  
(Counsel for Bellsouth  
Corporation)

Gary M. Epstein  
James H. Barker  
Latham & Watkins  
Suite 1300  
1001 Pennsylvania Ave., NW  
Washington, DC 20004-2505  
(Counsel for DIRECTV, INC.)

Michael H. Hammer  
Michael G. Jones  
Willkie, Farr & Gallagher  
Three Lafayette Centre  
1155 21st Street, NW  
Suite 600  
Washington, DC 20036-3384  
(Counsel for Continental  
Cablevision, Inc.)

Robert J. Sachs  
Howard B. Homonoff  
Continental Cablevision, Inc.  
The Pilot House  
Lewis Wharf  
Boston, MA 02110



---

Inder Kashyap